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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 STEVEN SWARTWOOD; JOANNA  
11 SWARTWOOD; R.S., a minor; D.S., a  
12 minor,

13 Plaintiffs,

14 v.

15 COUNTY OF SAN DIEGO; SAN  
16 DIEGO HEALTH AND HUMAN  
17 SERVICES AGENCY; POLINSKY  
18 CHILDREN'S CENTER; MAYA  
19 BRYSON,

20 Defendants.

Civil 12CV1665-W (BGS)  
No.

21 **ORDER GRANTING IN PART  
22 AND DENYING IN PART  
23 PLAINTIFFS' MOTION TO  
24 COMPEL**

[Doc. No. 30]

25 Before the Court is Plaintiffs' motion to compel documents over which  
26 Defendants have asserted the deliberative process, official information and attorney-  
27 client privileges. (Doc. No. 30.) Having considered the parties' briefs and  
28 accompanying submissions, the Court grants Plaintiffs' motion in part and denies it in  
part.

**I. Background**

25 This is an action filed under 42 U.S.C. § 1983 for civil rights violations and  
26 the matter includes a cause of action pursuant to *Monell v. Dep't of Soc. Servs. of New*  
27 *York*, 436 U.S. 658 (1978). (Compl., Doc. No. 1.) In addition, Plaintiffs have pendent  
28 state claims for assault, battery, false imprisonment, intentional infliction of emotional

1 distress, as well as violations of state civil rights laws. (*Id.*) Specifically, Plaintiffs  
 2 Steven and Joanna Swartwood, along with their two minor children through their  
 3 guardian ad litem, allege Defendants violated their constitutional rights by wrongfully  
 4 removing and detaining the two children from May 17, 2011 to May 19, 2012. (*Id.*)  
 5 Plaintiffs also allege Defendants conducted an illegal and intrusive physical  
 6 examination of the children without the parents' presence or consent. (*Id.*)

7 Plaintiffs move to compel disclosure of: (1) approximately 11 lines of text  
 8 redacted from documents prepared as a result of the Office of the Ombudsman's  
 9 investigation into Plaintiffs' complaints against the social worker who removed the  
 10 children, and (2) a line of redacted text from an email stream.<sup>1</sup> (Pls.' Mot. To Compel;  
 11 Doc. No. 30.)

## 12 II. Discussion

### 13 A. Discovery Legal Standard

14 Federal Rule of Civil Procedure 26 governs the scope of discovery, and  
 15 provides "[p]arties may obtain discovery regarding any nonprivileged matter that is  
 16 relevant to any party's claim or defense . . . . Relevant information need not be  
 17 admissible at the trial if the discovery appears reasonably calculated to lead to the  
 18 discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Federal privilege law  
 19 applies in this federal question case. *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d  
 20 1005, 1009 (9th Cir.1996) (citing Fed. R. Evid. 501.)

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 23 <sup>1</sup>Plaintiffs' motion also addresses Defendants' delay in producing the privilege log and  
 24 argues delay as a basis for the Court to decide Defendants waived their right to assert privileges.  
 25 (Pls.' Mem. of P.& A. at 9; Doc. No. 30.) Although Plaintiffs make cogent arguments regarding  
 26 Defendants' delay in producing a privilege log, the Court finds it more appropriate to directly  
 27 address the merits of the privilege claims rather than first engage in the "holistic reasonableness  
 28 analysis" required to decide whether Defendants waived privilege. *Burlington Northern & Santa  
 Fe Ry Co. v. U.S. District Court for Dist. of Montana*, 408 F.3d 1142, 1149 (2005). Ultimately the  
 privilege log was produced and contained sufficient information to allow Plaintiffs and the Court  
 to analyze the claimed privileges. Thus, ordering disclosure based on waiver in these  
 circumstances would amount to the "mechanistic determination" the Ninth Circuit cautioned  
 against in *Burlington. Id.*

1 **B. Analysis of Claimed Privileges**

2 **1. Deliberative Process Privilege**

3 Defendants asserted the Deliberative Process Privilege as a basis to withhold  
 4 11 times of text reflecting the findings and conclusions of an investigation by the  
 5 Health and Human Services Agency's special unit, the Office of the Ombudsman  
 6 ("Ombuds"). The Ombuds is comprised of a group of four employees that work under  
 7 the umbrella of the Health and Human Services Agency ("Agency"). The Ombuds  
 8 independently investigate complaints made against social workers and report the  
 9 results of those investigations to the Agency's department of Child Welfare Services.  
 10 (Zanders-Willis Decl. at ¶¶ 1,3; Doc. No. 33-2.) Here, the Ombuds conducted an  
 11 investigation into the actions of the social worker who removed Plaintiffs' minor  
 12 children from the home and it is the investigators' conclusions and recommendations  
 13 regarding the social worker's actions in this matter at issue in this privilege dispute.  
 14 (*Id.* at ¶ 12.)

15 Federal law recognizes the deliberative process privilege, which shields  
 16 confidential inter-agency memoranda on matters of law or policy from public  
 17 disclosure. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1116 (9th  
 18 Cir.1988). Under the privilege, a government may withhold documents that "reflect  
 19 advisory opinions, recommendations and deliberations comprising part of a process by  
 20 which government decisions and policies are formulated." *FTC v. Warner Commc'ns*  
 21 *Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984). The purpose of the privilege is "to promote  
 22 frank and independent discussion among those responsible for making governmental  
 23 decisions and also to protect against premature disclosure of proposed . . . policies or  
 24 decisions." *Id.* (citations omitted).

25 In order to be protected by the deliberative-process privilege, "a document  
 26 must be both (1) predecisional or antecedent to the adoption of agency policy and  
 27 (2) deliberative, meaning it must actually be related to the process by which policies  
 28 are formulated." *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir.2000).

1 Notably, even when the deliberative process privilege applies, the privilege is a  
 2 qualified one and if a litigant's need for the materials and need for accurate fact-  
 3 finding outweigh the government's interest in confidentiality, the materials will be  
 4 disclosed. *FTC*, 742 F.2d at 1161.

#### 5 **a. Predecisional**

6 A "predecisional" document is one "prepared in order to assist an agency  
 7 decisionmaker in arriving at his decision," and may include "recommendations, draft  
 8 documents, proposals, suggestions, and other subjective documents which reflect the  
 9 personal opinions of the writer rather than the policy of the agency." *Maricopa*  
 10 *Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir.1997). Moreover,  
 11 "the agency must identify a specific decision to which the document is predecisional."  
 12 *Id.* at 1094.

13 The declarations submitted by Defendants indicate the redacted lines of text  
 14 contained in the Office of Ombudsman Brief Case Review: Swartwood Family,  
 15 constitute a predecisional document because the Ombuds investigator's findings and  
 16 recommendations precede any ultimate action such as revision of policies or  
 17 procedures. (Zanders Decl.; Doc. No. 33-2, Hoene Decl.; Doc. No. 33-3.) The  
 18 decision to revise policies and procedures would not be made by Ombuds investiga-  
 19 tors, those decisions are ultimately made by Agency management. (*Id.*) Thus, this  
 20 order finds that the Office of Ombudsman, Brief Case Review document is  
 21 predecisional because the investigator's findings are recommendations reflecting the  
 22 investigator's opinions rather than a policy decision of the Agency.

#### 23 **b. Deliberative**

24 The next issue is whether the findings and recommendations of the Ombuds  
 25 investigation are deliberative. A predecisional document is part of the deliberative  
 26 process if "the disclosure of [the] materials would expose an agency's decision-making  
 27 process in such a way as to discourage candid discussion within the agency and  
 28 thereby undermine the agency's ability to perform its functions." *Carter v. U.S. Dep't*

1 *of Commerce*, 307 F.3d 1084, 1089 (9th Cir.2002). “[P]redecisional materials are  
2 privileged to the extent they reveal the mental processes of decision-makers.” *Id.* at  
3 1090. Moreover, “the document is considered to be part of the deliberative process as  
4 long as it is . . . actually related to the process by which policies are formulated” *Nat’l*  
5 *Wildlife*, 861 F.2d at 1118.

6 Defendant argues the results of this Ombuds investigation “is precisely the  
7 type of information protected by the deliberative process privilege.” (Defs.’ Mem. of  
8 P. & A. ISO Opp’n at 5; Doc. No. 33.) According to Defendants, the investigation  
9 findings are deliberative because the investigator seeks out evidence and makes  
10 determinations based on facts. (*Id.*) The findings and recommendations relate to the  
11 process by which policies are formulated because based on the investigation, the  
12 Agency often will implement additional training or change existing policies and  
13 practices. (Zanders-Willis Decl. at ¶ 4; Doc. No. 33-2.)

14 Plaintiffs appear to concede the deliberative nature of the information  
15 contained in the redacted text. (Pls.’ Mem. of P. & A. at 6; Doc. No. 33 (stating  
16 “Defendant’s deliberative privilege claim cannot be applicable to the information on  
17 page 25 of the Ombudsman report because the deliberative process of the County is  
18 itself in dispute.”).) By arguing that their need for disclosure of the redacted text stems  
19 from the fact the deliberative process is precisely at issue in this case, Plaintiffs cannot  
20 also argue the documents sought are not deliberative in nature.

21 Because the findings and recommendations of the Ombuds investigation  
22 appear both predecisional and deliberative, they may fit within the protective realm  
23 of the deliberative-process privilege. Defendant, however, cites to no controlling  
24 authority applying the deliberative process privilege in the context of a civil rights case  
25 to documents like the one sought through Plaintiffs’ request. Other courts in the Ninth  
26 Circuit have rejected a defendant’s use of the deliberative process privilege in relation  
27 to internal affairs investigations, as these communications are not designed to  
28 contribute to the formulation of important public policy and are routinely generated.

1 *See Soto v. City of Concord*, 162 F.R.D. 603, 612–13 (N.D. Cal. 1995) (“The  
 2 ‘deliberative process’ privilege, closely related to the self-critical analysis privilege,  
 3 is also inappropriate for use in civil rights cases against police departments.”); *Pittman*  
 4 *v. County of San Diego*, 2010 WL 3733867, at \*3 (S.D. Cal. Sept.17, 2010). Although  
 5 this is not a civil rights case against a police department, those cases are instructive  
 6 because this is a civil rights case against a government agency and the documents at  
 7 issue here result from an internal investigation akin to internal affairs investigations  
 8 arising out of complaints made against police department personnel.

9 Because existing case law does not precisely address whether the deliberative  
 10 process privilege applies to the documents at issue in this litigation, in an abundance  
 11 of caution and in order to afford Defendants the benefit of the doubt that the privilege  
 12 applies in the circumstances, the Court will conduct the balancing analysis to  
 13 determine whether Plaintiffs’ need for disclosure outweighs Defendants’ interest in  
 14 confidentiality.

### 15 **c. Balancing of Factors to Decide Whether Disclosure Appropriate**

16 “A litigant may obtain deliberative materials if his or her need for the  
 17 materials and the need for accurate fact-finding override the government’s interest in  
 18 non-disclosure.” *FTC*, 742 F.2d at 1161. In balancing the need for disclosure against  
 19 the need for confidentiality, the Ninth Circuit has considered the following factors:  
 20 “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the  
 21 government’s role in the litigation; and (4) the extent to which disclosure would hinder  
 22 frank and independent discussion regarding contemplated policies and decisions.” *Id.*  
 23 Other factors courts may consider include: “(5) the interest of the litigant, and  
 24 ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation  
 25 and the issues involved, (7) the presence of issues concerning alleged governmental  
 26 misconduct, and (8) the federal interest in the enforcement of federal law.” *North*  
 27 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp.2d 1118, 1122 (N.D. Cal. 2003). The

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1 deliberative-process privilege should be “strictly confined within the narrowest  
2 possible limits consistent with the logic of its principles.” *Id.*

3 **i. Relevance.**

4 The gravamen of Plaintiffs’ complaint is Defendants violated Plaintiffs’  
5 constitutional rights by removing the children from the home and detaining them  
6 unnecessarily. Further, Plaintiffs state a *Monell* claim against the County of San Diego  
7 on the basis that the County failed to change its policies and counsel or discipline  
8 social workers following citizen complaints. (Pls.’ Mem. P. & A. at 7.) The lines of  
9 text in dispute are centrally relevant to Plaintiffs’ claims because they contain the  
10 Ombuds investigators’ conclusions and recommendations regarding the social workers’  
11 actions after conducting an independent investigation into Swartwood matter.  
12 (Zanders- Willis Decl. at ¶ 12.) Further, these conclusions and recommendations are  
13 considered by the Ombud’s Child Welfare Services Director, who makes decisions as  
14 to whether or not applicable policies and procedures need improvements. (Decl.  
15 Hoene; Doc. No. 33-3.) The findings and recommendations provide important  
16 information concerning the adequacy of the social workers’ actions in the Swartwood  
17 matter and the sufficiency of the Agency’s policies and procedures—issues at the heart  
18 of this litigation. Defendants concede the information sought is relevant to Plaintiffs’  
19 *Monell* claim.

20 Accordingly, the Court concludes the redacted text is relevant to the case.

21 **ii. Availability of Comparable Evidence From Other Sources.**

22 The lines of text in question are the findings and recommendations of an  
23 internal independent investigation by the Office of Ombudsman. One of Ombuds’  
24 significant roles is to investigate complaints made against social workers and make  
25 findings and recommendations stemming from the investigation. (Zanders Decl. ¶¶ 3-  
26 5.) Defendants concede this information is not available from other sources. (Defs.’  
27 Mem. of P. & A. ISO Opp’n at 7.) This factor weighs heavily in favor of disclosure.  
28 *See North Pacifica*, 274 F. Supp. 2d at 1124 (noting that this factor is “perhaps the

1 most important factor in determining whether the deliberative-process privilege should  
2 be overcome”).

### 3 **iii. Government’s Role in the Litigation.**

4 Obviously, as a defendant, the government plays a prominent role in this  
5 litigation. In *Newport Pacific, Inc. v. County of San Diego*, 200 F.R.D. 628, 640 (S.D.  
6 Cal. 2001), the court held the “nature of the allegations and the role of the government  
7 in the litigation itself . . . tip [ped] the scales in favor of disclosure.” Thus, the  
8 government’s role in this litigation similarly militates toward disclosure.

### 9 **iv. Chilling of Agency Discussion.**

10 Defendants rely on a declaration by Debra Zanders-Willis, Deputy Director  
11 of Child Welfare Services, for the proposition that the entire process of Ombuds  
12 investigations “would be tainted because the investigator, instead of being independent  
13 and simply following the evidence wherever it leads, would likely be affected by  
14 knowing that the person complaining about the social worker will likely be informed  
15 of the results of the investigation . . . .” (Zanders-Willis Decl. ¶ 9.) Zanders-Willis  
16 contends independent investigations may cease completely if the results of investiga-  
17 tions could be provided to plaintiffs in subsequent civil lawsuits. (*Id.*) Despite the  
18 entrance of a protective order in this matter, Zanders-Willis argues the protection of  
19 the order does not alleviate the concerns of disclosure because Defendants are more  
20 concerned with the detriment of disclosing the results to plaintiffs as opposed to  
21 outside parties. (*Id.*)

22 In *Sanchez v. Johnson*, 2001 WL 1870308 \*1 (N.D. Cal. 2001), the court  
23 faced similar contentions regarding the chilling effect disclosure of documents would  
24 have on behind-the-scenes discussions. There the court held disclosure of the  
25 documents “intrude[d] minimally, and without prejudice, into agency deliberations.”  
26 *Sanchez*, 2001 WL 1870308 at \*4 n. 7. And in *Price v. County of San Diego*, 165  
27 F.R.D. 614, 620 (S.D. Cal. 1996), the court similarly found the documents at issue  
28 should be produced and noted “the infringement upon the frank and independent

1 discussions regarding contemplated policies and decisions by the County . . . can be  
2 alleviated through the use of a strict protective order.”

3 This Court finds both decisions persuasive. In short, Defendants’ concerns  
4 regarding the frankness of Agency discussion does not weigh strongly against  
5 disclosure and can be mitigated through the use of the protective order.

6 **v. Interest in Judicial Fact-finding and Seriousness of  
7 Litigation Issues.**

8 The desirability of accurate fact-finding weighs in favor of disclosure.  
9 Moreover, the issue in this litigation is whether the County and its agencies complied  
10 with federal law when removing and detaining the minor children. In addition,  
11 Plaintiffs assert *Monell* claims geared toward determining whether Defendants failed  
12 to change policies, advise, or discipline social workers following formal complaints  
13 and investigations into social workers’ decisions to remove and detain children. (Pls.’  
14 Mem. of P. &A. at 7.) Defendants would be hard-pressed to argue a serious issue is  
15 not at stake in this litigation. The seriousness of the issue involved magnifies the  
16 interest of the court and society in accurate fact-finding. *See L.H. v. Schwarzenegger*,  
17 2007 WL 2009807 \*1, 8 (E.D. Cal July 6, 2007) (finding when issues involved are  
18 alleged violations of federally-protected civil rights, disclosure is favored). These  
factors support disclosure of the redacted text.

19 **vi. Issues of Alleged Government Misconduct And Federal  
20 Interest In Enforcement of Federal Law.**

21 The misconduct alleged include Defendants’ failure to change Agency  
22 policies and counsel or discipline social workers when complaints are made, as well  
23 as failure to properly investigate before removing minors from the home—a matter of  
24 constitutional significance. (Pls.’ Mem. of P. & A. at 7-8.) As such, federal interest  
25 in the enforcement of constitutional law is clearly at play here. These factors also  
support disclosure.

26 **vii. Conclusion of Factor Analysis**

27 Applying the multi-factor balancing test, the Court finds Plaintiffs’ need for  
28 disclosure overrides Defendants’ interest in confidentiality. In sum, the Ombuds  
investigation of the Swartwood matter is clearly relevant because it concerns the

specific incident listed in Plaintiffs' complaint; the information was generated by the Ombuds, a special unit of the Health and Human Services Agency; the information is not otherwise available to Plaintiffs; this type of investigative document is routinely generated by Defendant San Diego Health and Human Services Agency; and the claims concern federal civil rights law. Thus, the Court overrules Defendants' use of the deliberative process privilege as a basis to refuse to produce the redacted lines of text.

## 2. Official Information Privilege

Defendants also asserted the Official Information Privilege as a basis to withhold the 11 lines of text reflecting the conclusions and recommendations of the Ombuds investigation into the social worker's actions in the Swartwood matter.

The official information privilege is also a "qualified privilege" under federal common law that "must be formally asserted and delineated in order to be raised properly." *Kerr v. U.S. District Court for the Northern District of California*, 511 F.2d 192, 198 (9th Cir. 1975). In determining what level of protection should be afforded by this privilege, courts conduct a case by case balancing analysis, in which the interests of the party seeking discovery are weighed against the interests of the governmental entity asserting the privilege. *Kelly v. City of San Jose*, 114 F.R.D. at 660; *Miller v. Pancucci*, 141 F.R.D. at 300; *Hampton v. City of San Diego*, 147 F.R.D. at 230–31.

Before the Court, however, engages in the balancing of interests, the party asserting the privilege (Defendant San Diego Health and Human Services Agency) must properly invoke the privilege by making a "substantial threshold showing." *Kelly*, 114 F.R.D. at 669. In order to fulfill the threshold requirement, the party asserting the privilege must submit a declaration from a responsible official with personal knowledge of the matters to be attested to in the declaration. *Id.* The declaration must include: "(1) an affirmation that the agency generated or collected the material in issue and has maintained its confidentiality; (2) a statement that the official has personally reviewed the material in question; (3) a specific identification of the governmental or

1 privacy interests that would be threatened by disclosure of the material to plaintiff  
2 and/or his lawyer; (4) a description of how disclosure subject to a carefully crafted  
3 protective order would create a substantial risk of harm to significant governmental or  
4 privacy interests, and (5) a projection of how much harm would be done to the  
5 threatened interests if disclosure were made.” *Id.* at 670.

6 Defendant submitted a declaration by Debra Zanders-Willis, Deputy Director  
7 of Child Welfare Services. (Zanders-Willis Decl., Doc. No. 33-2.) The declaration  
8 states the Agency and its Office of the Ombudsman generated the material at issue and  
9 maintained its confidentiality insofar as it has not been disclosed to anyone other than  
10 the Ombuds, Agency management and County Counsel. (Zanders-Willis Decl. at  
11 ¶¶ 5, 7.) Zanders-Willis also personally reviewed the materials in question. (*Id.* at  
12 ¶ 12.) (*Id.*) Her declaration states the interests of the Agency would be threatened by  
13 disclosure of the material to Plaintiffs or their lawyer because it will likely taint future  
14 investigators’ willingness to independently follow evidence where it leads and the  
15 Agency would no longer want to investigate complaints and make recommendations  
16 for policy and procedure improvements if the information could be made available to  
17 plaintiffs in subsequent civil suits. (*Id.* at ¶ 9.) According to Zanders-Willis, the  
18 protective order would not alleviate the risk of harm to the Agency because the  
19 “substantial detriment to the Agency would result from disclosing the investigation  
20 results to the parties in this lawsuit, not outside parties.” (*Id.* at ¶ 10.) Zanders-Willis,  
21 however, was not able to project the harms that would be suffered by disclosure of the  
22 Ombuds investigation findings. (*Id.* at ¶ 11.) Rather, she mentioned that as a result of  
23 past investigations, policies and procedures have improved over the years, and she  
24 fears the Agency will cease to allow investigations in the future if the results and  
25 recommendations are subject to disclosure. (*Id.*)

26 The purpose of the declaration in support of an assertion of the official  
27 information privilege “is to provide the court with the information it needs to make a  
28 reasoned assessment of the weight of the interests that line up, in the particular

1 situation before the court, against the requested disclosure.” *Kelly*, 114 F.R.D. at 670.  
 2 The general assertions of potential harm in Zanders-Willis’s declaration fail to  
 3 establish that the potential disadvantages of disclosure outweigh the potential benefits  
 4 of disclosure. *Miller*, 141 F.R.D. at 299.

5 For example, in *Soto v. City of Concord*, 162 F.R.D. 603, 613 (N.D. Cal.  
 6 1995), the court found that, where the defendants asserted only “the general  
 7 proposition that internal affairs investigatory documents and statements of police  
 8 officers and/or witnesses should remain secret in order to encourage ‘frank discus-  
 9 sions,’ ” that assertion was “insufficient to meet the threshold test for invoking the  
 10 official information privilege” 162 F.R.D. at 614. “ ‘[A] general claim of harm to the  
 11 “public interest” is insufficient to overcome the burden placed on the party seeking to  
 12 shield material from disclosure.’ [Citation omitted.]” *Id.* (quoting *Kelly*, 114 F.R.D. at  
 13 672).

14 Other courts have held a declaration in support of the official information  
 15 privilege must “provide *specific* information about how disclosure of the *specific*  
 16 documents requested . . . would threaten the *specific* governmental and privacy  
 17 interests at stake.” *Bernat v. City of California City*, 2010 WL 4008361, at \*3 (E.D.  
 18 Cal. 2010) (italics in original). Like in *Bernat*, the declaration submitted to assert the  
 19 privilege in this matter fails to provide *specific* information about how disclosure of  
 20 the *specific* lines of text requested would threaten a *specific* governmental interest at  
 21 stake. (See generally Zanders-Willis Decl. at Doc. No. 33-2.) In fact, the only harm  
 22 asserted in the declaration is harm that *may* result if the Agency *may* decide to no  
 23 longer conduct Ombuds investigations out of fear disclosure *may* subject it to civil  
 24 liability. (*Id.* at ¶¶ 9, 11.) The mere possibility that disclosure will “increase the  
 25 likelihood of civil liability depending on the result of the investigation” is not the type  
 26 of harm the privilege seeks to protect against. (*Id.* at ¶ 9.) This assertion is more akin  
 27 to “[a] general claim of harm to the public interest [that] would not be sufficient to  
 28 overcome the burden placed on the party seeking to shield material from disclosure.”

1 *Kelly*, 511 F.2d at 672. Rather, when the results of an internal investigation reveal  
2 facts and findings that may increase the likelihood the Agency will be found liable for  
3 a civil rights violation, the information is exactly the important information necessary  
4 to assist plaintiffs in proving their cases.

5 Defendants' hypothetical situation conceivably *could* apply here if disclosure  
6 of the results of the investigation in this case *would* result in the Ombuds no longer  
7 conducting independent investigations into future complaints against social workers.  
8 This reasoning is flawed and at best is speculative. The declaration does not  
9 substantiate that independent investigations will in fact cease if disclosure is ordered  
10 in this matter. (Zanders-Willis Decl. at ¶ 9.) Further, the declaration's claim that future  
11 independent investigations will be tainted is based on unsound reasoning. (*Id.*)  
12 Zanders-Willis contends that if the *independent* investigators learn their investigations  
13 will have greater transparency and potentially be subject to public review, rather than  
14 conducting their investigations as they do now—by “simply following the evidence  
15 wherever it leads”—the investigators will become biased. (*Id.*) In addition to Zanders-  
16 Willis's failure to offer any facts to support such a fantastical theory, the idea that  
17 independent investigators will suddenly fail to see themselves as independent if the  
18 results of investigations are subject to disclosure defies logic. Essentially, the  
19 declaration states Ombuds independent investigators only remain unbiased because the  
20 results of their investigations remain confidential to people outside the Agency. Yet,  
21 the declaration offers no evidence to support the contention that independent  
22 investigators will become biased if the results of their investigations could be subject  
23 to disclosure.

24 Accordingly, Defendants fail to meet their threshold burden to invoke the  
25 privilege because the declaration only generally asserts Ombuds investigation results  
26 should be kept confidential based on the hypothetical proposition that disclosure could  
27 harm future investigations and “cripple the Agency's ability to self-evaluate and  
28 improve its policies.” (Zanders- Willis Decl. at ¶ 9.) The Court finds the declaration

1 in this case lacks the requisite specificity and fails to allege any more than the general  
 2 allegation of “harm to candid communications” that was found insufficient in *Soto* and  
 3 *Miller*. Therefore, Defendants’ assertion of the official information privilege is  
 4 overruled and the lines of redacted text from the Office of Ombudsman, Brief Case  
 5 Review: Swartwood Family must be produced.

### 6 **3. Attorney-Client Privilege**

7 Defendants asserted the attorney-client privilege with respect to one line of  
 8 text contained in a email stream circulated among Agency employees. (Defs.’ Mem.  
 9 of P. & A. ISO Opp’n at 8.)

10 The attorney-client privilege protects “communications between client and  
 11 attorney for the purpose of obtaining legal advice, provided such communications were  
 12 intended to be confidential.” *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001).  
 13 “Because the attorney-client privilege has the effect of withholding relevant  
 14 information from the fact-finder, it is applied only when necessary to achieve its  
 15 limited purpose of encouraging full and frank disclosure by the client to his or her  
 16 attorney.” *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127, 129 (9th Cir.1992)  
 17 (citing *Fisher v. United States*, 425 U.S. 391, 403 (1976)). As the party asserting the  
 18 privilege, Defendants bear the burden of establishing that the attorney-client privilege  
 19 applies. *Clarke*, 974 F.2d at 129.

20 Defendants have successfully established that the lines of text redacted from  
 21 the email stream on page 33 of the document production fall within the attorney-client  
 22 privilege. The text mentions Lisa Macchione, Senior Deputy County Counsel  
 23 responsible for advising the Health and Human Services Agency and specifically the  
 24 Child Welfare Services Department. According to Defendants, the redacted text  
 25 repeats legal advice given by Lisa Macchione to Defendants. The email is written by  
 26 Theresa Pelenska, Child Welfare Services Manager, and sent to Ann Fox, a manager  
 27 at Child Welfare Services, as well as to Elyce Hoene, Protective Services Supervisor  
 28 in the Health and Human Services Agency and Ed Cadena, Assistant Deputy Direct.

1 All recipients work for Defendants, thus are covered as clients by the attorney-client  
2 privilege.

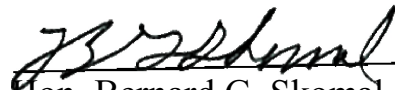
3 Plaintiffs fail to provide any evidence or argument to refute the claim of  
4 attorney-client privilege with respect to this text. Accordingly, Plaintiffs' motion to  
5 compel the redacted text from this email stream is DENIED.

6 **III. Conclusion**

7 For all of the above reasons, Plaintiffs' Motion to Compel disclosure is  
8 GRANTED in part and DENIED in part. Defendants must disclose the redacted text  
9 related to the investigation into the Swartwood's complaints against the social worker,  
10 lodged as Exhibit D to Defendants' Opposition. Defendant must produce the  
11 documents without redaction no later than **December 23, 2013**. The Court, however,  
12 denies Plaintiffs' request for disclosure of the redacted email stream because the text  
13 falls under the protection of the attorney-client privilege.

14 IT IS SO ORDERED.

15  
16 DATED: December 18, 2013

17   
18 Hon. Bernard G. Skomal  
19 U.S. Magistrate Judge  
20 United States District Court  
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